*UNITED STATES DISTRICT COURT*

*DISTRICT OF MAINE*

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| ***VALEDA DAVIS,*** | ***)*** | |
| | ***)*** | |
| ***Plaintiff*** | ***)*** | |
| | ***)*** | |
| ***v.*** | ***)*** | ***Docket No. 98-13-P-DMC*** |
| | ***)*** | |
| ***UNITED STATES OF AMERICA,*** | ***)*** | |
| | ***)*** | |
| ***Defendant*** | ***)*** | |

## *FINDINGS OF FACT AND CONCLUSIONS OF LAW*[1]

By complaint filed January 14, 1998 Valeda Davis sued the United States of America for damages arising from a fall she sustained in a parking garage at a Department of Veterans Affairs hospital in Georgia where she had gone to visit an ailing son. A bench trial in this matter was held before me on November 24, 1998. I now find for the plaintiff on the basis of the following findings of fact and conclusions of law.

### I. Findings of Fact

1. Valeda Davis, a resident of Brunswick, Maine, travelled with her son Peter and his wife Linda to Georgia in March 1996 to visit Davis's son Charles Davis, Jr., known as "Chappy," at the Department of Veterans Affairs Medical Center in Decatur, Georgia (the "VA Hospital").

[1]Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

Peter and Linda planned to travel on to Florida directly from the VA Hospital, leaving Davis to spend time with Chappy's family in Georgia and to continue visiting Chappy at the VA Hospital.

2. Davis, who was born on June 16, 1913, was then 82 years old. Although she had previously driven through Georgia, she never before had stopped there.

3. Davis and her relatives arrived at the VA Hospital on the afternoon of March 16, 1996, where they were met by Chappy's wife Aurora, Chappy's son Charles III and Charles III's three-year-old daughter Holly. Davis visited Chappy for about thirty minutes. He was on life support, with a breathing tube inserted in his throat, and Davis could tell that he was uncomfortable. Although Chappy seemed to know his wife, he gave no indication that he recognized his mother.

4. Following the brief visit, Davis departed the VA Hospital at approximately 3 p.m. with Aurora, Charles III and Holly. The group headed out of the VA Hospital onto a skybridge connecting the VA Hospital building to a Department of Veterans Affairs parking garage, with Aurora, Charles III and Holly walking ahead of Davis. This route was new to Davis, who had come into the VA Hospital a different way when she first arrived.

5. After traversing the skybridge and passing by a bank of elevators, the group entered the garage itself. The garage appeared markedly darker to Davis than the brightly lit VA Hospital and skybridge through which she had just passed, giving an appearance of "dusk." Davis saw Charles III veer to the right and walk away from the group, while Aurora continued walking with Holly about six feet in front of her. She attempted to follow Aurora and Holly, alternately looking up to keep an eye on them and down to see where she was going.

6. Suddenly, Davis tripped over a wheelstop[2] and fell, landing in a puddle of water. She was in intense pain. She had not noticed the object prior to her fall. She had seen only what she thought was an unmarked, flat expanse of concrete garage floor.[3]

7. The wheelstop over which Davis tripped had been placed in an area formerly designated as a pedestrian aisle. At some time prior to March 16, 1996 the pedestrian aisle had been narrowed to five feet wide to make room for a wider, van-accessible handicapped-parking space. A straight white line had been painted to mark the new edge of the narrowed pedestrian aisle, which was demarcated by diagonal white stripes. To the extent that stripes extended into the new parking space (because they demarcated a formerly wider pedestrian aisle), they had been painted gray in an

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[2]A wheelstop is a block placed at the head of a parking space to stop vehicles from moving beyond the designated space.

[3]I reach this conclusion despite conflicting testimony from a credible witness, Myron Stenhouse, who was employed as a police officer for the VA Hospital. Stenhouse was called to the scene immediately after Davis's fall. He testified that shortly after his arrival, and while Davis still lay on the garage floor, he asked her what had happened. According to Stenhouse, Davis blamed herself for the accident, calling herself a "silly old lady" and stating that she had tried to step over the wheelstop, caught her foot on it and fell. At trial Davis, herself a credible witness, insisted that she did not see the wheelstop before she tripped over it. She further testified that immediately after she fell, she was in intense pain and drifted in and out of consciousness. She did not recall talking to a police officer. While there is conflicting evidence, including from Stenhouse, as to whether Davis did lose consciousness at the scene, she was at a minimum experiencing severe pain and mortified by the situation. That Davis was embarrassed and initially blamed herself for the fall is a natural emotional reaction that simply is not reliably probative of what happened. I conclude that, while Stenhouse had every intention to make an accurate report, he either misunderstood Davis's account of what happened or, if he did understand her correctly, she misreported it in the wake of the serious injury, pain and embarrassment she had just suffered. Edie Scott, a nurse for the VA Hospital and the only eyewitness whose testimony was offered, stated that Davis did not stop walking before she fell. This is consistent with Davis's testimony at trial that she simply did not see the object and walked right into it. Further, I find it highly unlikely that, had Davis seen the wheelstop, which was five inches high, she would have attempted to negotiate it. My sense at trial was that she was a cautious person who, among other things, had never before sustained a similar fall.

effort to make them blend into the concrete floor. The wheelstop — made of the same concrete material as the garage floor and unpainted — had been placed at the head of the new parking space, approximately six inches from the outer edge of the narrowed pedestrian aisle.

8. This new arrangement, which was accomplished either by, or at the direction of, the United States, suffered from several flaws.

(a). First, the area was insufficiently lighted in view of the marked change in lighting from the brightly lit VA Hospital and skybridge into the darker garage. This helped create conditions under which, in the moments before a person's eyes could adjust to the change in light, obstructions in his or her pathway would not be readily visible.[4]

(b). Second, the placement of the wheelstop close to the garage entrance, and a

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[4]There was no reliable evidence besides Davis's testimony as to lighting conditions in the garage at the time she fell. Photographs were introduced into evidence depicting the site at which Davis fell. *See* Exhs. 8 and 9. However, no one was able to explain who took the photographs, on what date, at what time of day, under what weather conditions or whether by flash or natural lighting. Nor could anyone edify the court as to whether any of those photographs reflected the effects of a major relighting project that the VA Hospital's environmental care manager, Jeffrey Jones, testified took place after Davis's fall. (While evidence of the relighting project was inadmissible for purposes of proving liability, it was germane to the question whether photographs and testimony concerning lighting mirrored conditions present at the time of Davis's fall.) The testimony of both the plaintiff's and the defendant's experts, similarly, was not helpful on the question of lighting conditions. The plaintiff's expert, Kris Larsen, never visited the site. The defendant's expert, Peter S. Parsonson, testified that he personally inspected the site at approximately 3 p.m. on May 27, 1998 and at approximately 9:30 a.m. on November 11, 1998 and found it to be adequately lit. Both of Parsonson's visits, however, took place during a different time of year than Davis's fall. The May visit, while ostensibly at the same time of day, occurred during daylight-saving time. Again, it was unclear whether the lighting in the area was revamped prior to Parsonson's visits, and he could not swear that the weather conditions or the lighting were the same when he inspected the site as on the day of Davis's fall. Edie Scott, an eyewitness to Davis's fall, did testify that she had no trouble seeing the wheelstop or striping on the concrete floor on the day of the fall. However, inasmuch as appears from her testimony, she had been taking a smoking break at the time of the fall, affording her eyes time to adjust to the lower lighting conditions of the garage.

bare six inches from the outer edge of the pedestrian aisle, combined with its lack of distinguishing pigmentation, rendered it potentially hazardous to passersby.

9. The United States had, at a minimum, constructive knowledge of these flaws inasmuch as the VA Hospital owned the garage and was responsible for its safety, instructing its personnel to perform periodic safety checks and walkthroughs.

10. After Davis fell, she was taken initially by stretcher to the VA Hospital's emergency room. From there, she was transferred to Crawford Long Hospital in Atlanta, where she remained from March 16 through March 21, 1996. At Crawford Long, Davis was diagnosed with a three-part displaced intertrochanteric fracture of her right hip. She underwent an open reduction and internal fixation procedure entailing placement of screws and a plate. Her medical records reveal that she suffered moderate to severe pain and discomfort from March 16 through March 18 and intermittent mild pain and discomfort during the remainder of her stay. Among the medications prescribed for her was intravenous morphine, ordered from March 16-21. The bill for treatment at Crawford Long totalled $20,905.92.[5]

11. Davis was transferred on March 21, 1996 to Emory University Hospital Center for Rehabilitation Medicine, where she stayed until her discharge on March 29, 1996. While there,

[5]The United States objects that some of the medical expenses claimed by Davis were not necessary or related to her fall at the parking garage but pinpoints no specific questionable expenses. Davis's medical records do reveal treatment for a facial lesion during her hospitalization in Georgia. However, I can find no specific line item in the bills for either Crawford Long Hospital or Emory University rehabilitation center that appears unrelated to treatment for her hip fracture. I will, however, disregard all bills for Davis's treatment by C. Monique Lucarelli, M.D., at Bowdoin Medical Group in Brunswick, Maine (relating to visits on May 1, 13 and 20, 1996 and August 13, 1996) inasmuch as these concerned treatment for hypertension, chronic cough and back pain.

Davis experienced intermittent pain and discomfort. The bill for her treatment at the rehabilitation unit totalled $10,018.26.

12. Upon discharge from the rehabilitation center, Davis returned to Maine. She was seen in followup for her hip surgery by Mark F. Henry, M.D., of Coastal Orthopedics/Sports Medicine in Brunswick, Maine on May 6, 1996, June 4, 1996 and July 23, 1996. During those visits, Dr. Henry observed that the fracture was healing well and was in good position. He did note, however, that Davis's right leg was approximately a quarter-inch shorter than her left, and that Davis reported some occasional mild pain and tenderness. Charges for Davis's consultations with Dr. Henry totalled $190.00.

13. Following her brief visit to the VA Hospital on March 16, 1996, Davis never saw Chappy again before he died.

14. Prior to March 16, 1996 Davis was in good health. She walked well and without need of a cane or walker. She was able to perform duties such as lawn-mowing on a tractor mower and painting, including getting up ladders. She walked both to complete errands and for pleasure, and frequently walked for more than one mile at a stretch. She also did some gardening.

15. As a result of fracturing her hip, Davis must now use a cane indoors and a walker out of doors. She can no longer navigate stairs well, which among other things poses a problem inasmuch as her bedroom was on the second floor. She can no longer take walks to town or with her ninety-four-year-old friend who still enjoys walking. She can no longer ride her tractor mower. She no longer can garden because she cannot stoop over.

16. The following items, entailing the following costs, would be useful to Davis in

ameliorating the effects of her broken hip: (i) a motorized scooter, $2,607.30,[6] (ii) a ramp at the front entrance to her home, $3,138.00,[7] (iii) a stair lift device, $3,798.00 (including sales tax), and (iv) a storage shed for the scooter, $2,440.00.

17. A white female age 85 can expect to live for an additional 6.3 years, or until age 91.3, according to preliminary 1997 data published in October 1998 by the National Vital Statistics System, National Center for Health Statistics, Centers for Disease Control and Prevention.

## II. Conclusions of Law

1. The United States is liable for its employees' negligent acts or omissions to the extent that a private person would be liable under the law of the state where the act or omission occurred, except that it cannot be held liable for prejudgment interest or punitive damages. 28 U.S.C. §§ 1346(b)(1), 2674; *Rodriguez v. United States*, 54 F.3d 41, 44 (1st Cir. 1995).

2. In this case, because the fall occurred in Georgia, Georgia law controls.

3. Premises owners in Georgia are liable to invitees for "failure to exercise ordinary care in keeping the premises and approaches safe." Ga. Code Ann. § 51-3-1.

4. "The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property," coupled with the invitee's lack of knowledge of the same. *Atlanta Gas Light Co. v. Gresham*, 394 S.E.2d 345, 346

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[6]Davis presented a listing of scooters from Majors Medical Supply ("MMS") with MMS prices ranging from a low of $1,930.50 to a high of $3,284.10. *See* Exh. 14b. I have selected a median price of $2,607.30, which also corresponds closely to the price of several of the listed scooter models.

[7]Davis also requested the sum of $2,547.00 to construct a rear ramp. *See* Exh. 14c. I am not persuaded, however, that she requires a ramp at both the front and back of her house.

(Ga. 1990) (citation and internal quotation marks omitted). A plaintiff's knowledge of the defect or his or her "equal means with the defendant of discovering it" precludes recovery. *Id*. (citation and internal quotation marks omitted).

5. An invitee in a slip-and-fall action must show, in addition to the existence of a hazard that proximately caused his or her injuries: "(1) that the defendant had actual or constructive knowledge of the hazard; and (2) that the plaintiff lacked knowledge of the hazard despite the exercise of ordinary care due to actions or conditions within the control of the owner/occupier." *Robinson v. Kroger Co.*, 493 S.E.2d 403, 414 (Ga. 1997).

6. An invitee is presumed to have at least the same level of knowledge of a "static condition" as does the owner/occupier — provided that the condition is visible. *Poythress v. Savannah Airport Comm'n*, 494 S.E.2d 76, 79 (Ga. Ct. App. 1997). A "static condition, by definition, is simply one that does not change." *Id*. Such a condition "is not dangerous unless someone fails to observe it and steps into it." *Id*. (citation and internal quotation marks omitted).

7. Under Georgia law, a plaintiff who consciously chooses to depart from an established pathway is held to assume heightened risk. *Farmer v. Wheeler/Kolb Mng't Co.*, 482 S.E.2d 475, 477 (Ga. Ct. App. 1997) (plaintiff "voluntarily departed from the route designated and maintained by the premises owner for her safety and convenience" in that she admitted she tripped over bumper while cutting through parking lot, walking between parked cars); *Gaydos v. Grupe Real Estate Investors*, 440 S.E.2d 545, 547 (Ga. Ct. App. 1994) (plaintiff assumed heightened risk when she took short-cut across lawn rather than using concrete walkway).

8. A hazard existed at the VA Hospital garage on the date of Davis's fall. The handicapped-parking space was placed in close proximity to the garage entrance, with a wheelstop

a mere six inches from the outer edge of the marked pedestrian aisle. The concrete wheelstop, which was unpainted, was the same color as the concrete garage floor. Because of the brightness of the lighting in the VA Hospital and connecting skybridge, the garage itself appeared dark upon initial entry, at least until one's eyes adjusted to the contrast in lighting. Given the close proximity of the wheelstop to the pedestrian aisle, at the least the wheelstop should have been painted a caution-alerting yellow.[8] Finally, the area in which Davis fell should have been more brightly illuminated to help counteract the effect of emerging from the brightly lit VA Hospital and skybridge.

9. The United States had, at a minimum, constructive knowledge of the hazard. The parking garage and lighting design were accomplished either by, or at the direction of, the United States. Employees of the VA Hospital inspected the garage regularly.

10. Davis lacked knowledge of the hazard. She had never before walked through the VA Hospital skybridge to the parking garage. She was exercising due care, watching where she was going. Yet, she did not see the concrete wheelstop. This was so because of conditions within the control of the United States — the placement and coloration of the wheelstop and the lighting of the area leading to and surrounding it.

11. The concrete wheelstop constituted a "static condition." However, inasmuch as it was not visible, Davis is not presumed to have had knowledge of it.

12. Davis did not voluntarily choose to depart from an established pathway. Rather, she did not see the established pathway at all. Hence, she assumed no heightened risk.

13. The United States is liable for damages Davis sustained as a result of her fall in its

[8]More appropriately, but not necessary to a decision in this case, in addition to painting the wheelstop yellow, the striping in the area of the original wider pedestrian aisle extending beyond the narrowed aisle should have been removed altogether to avoid any confusion.

parking garage on March 16, 1996. These include medical expenses totalling $31,114.18 and expenses for related accommodations (a front-entrance ramp, a motorized scooter, a scooter storage shed and a stair lift) totalling $11,983.30.

14. Davis also suffered intense pain and discomfort upon falling, moderate to severe pain and discomfort in the wake of her surgery, and occasional minimal pain and discomfort thereafter. For her pain and suffering, including without limitation that which resulted from her inability to spend more time with her son Chappy before his death, I find she is entitled to be recompensed in the additional amount of $50,000.00.

15. Davis, finally, has suffered diminished enjoyment of life as a direct result of her fall, including loss of the activity of walking for pleasure and without an aide and of the ability to garden and engage in other physical activities. For this, I find that she is entitled to be compensated in the additional amount of $50,000.00.[9]

In light of the foregoing, judgment shall enter in favor of Valeda Davis and against the United States for the sum of $143,097.48.

So ordered.

***Dated this 3rd day of December, 1998.***

***David M. Cohen***
***United States Magistrate Judge***

[9]In her trial brief, Davis also seeks damages for future medical bills, snow plowing, lawn care and home care (indoor and outdoor). However, she adduces no evidence as to likely cost of any of the foregoing. Inasmuch as these damages are speculative and uncertain, I will disregard them.